29 U.S.C. § 1132 (a)..... 2

29 U.S.C. §§ 1109 & 1132(a)..... 13

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois by the Honorable Matthew Kenelley relating to the questions involved herein are not reported and are included in the Appendix to this Petition. (App. B&O)

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 430 F3d 424 (7th Cir. 2005) and is included in the Appendix to this Petition. (App. O)

STATEMENT OF JURISDICTION

The Order denying reconsideration and hearing *en banc* was docketed in the United States Court of Appeals for the Seventh Circuit on January 17, 2006 and the amended Order was docketed on January 20, 2006. (App. A) These Orders were the final decision of the Court of Appeals. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S. C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America- Article III, Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all cases affecting Ambassadors, other public ministers and Consuls;--to all cases of admiralty and maritime Jurisdiction;--to controversies to which the

United States shall be a Party;--to controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

Employee Retirement Income Security Act of 1974, as amended ("ERISA") §409 [29 U.S.C. §1109]; Liability for breach of fiduciary duty –

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA §502(a) [29 U.S.C. § 1132(a)]; Civil enforcement -

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

to redress such violations or to enforce any provisions of this subchapter or the terms of the plan.

Federal Rules of Civil Procedure

Rule 23(e). Settlement, Voluntary Dismissal, or Compromise. (effective December 1, 2003)

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

Rule 23(e) (Prior to Amendment of 12/1/03)

Dismissal or Compromise: A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

STATEMENT OF THE CASE

A. Summary

This case arises from a suit filed as a class action in the United States District Court for the Northern District of Illinois. Petitioner Koresko was counsel to a putative class for which Sanchez and Daniels, its partners and certain employees were the representative plaintiffs (collectively "SD"). The claims are more fully discussed below.

Prior to disposition of a class certification motion, and just a few months before trial, SD sought to withdraw all class allegations and settle their individual claims in exchange for a substantial cash payment. (App. E) Petitioners Robert Schmier and Schmier-Fuerring Properties, Inc. ("Schmier"), members of the putative class, appeared through Koresko, filed objections to the settlement, and requested a stay in order to substitute a class representative. (App. C&D) The District Court denied any stay and deemed the other requests moot because it allowed SD to "withdraw" all class action allegations by way of amended complaint, and then dismissed the complaint. (App. O) Koresko and Schmier appealed to the United States Court of Appeals for the Seventh Circuit, but the Court held that Petitioners did not have standing to appeal.

B. History of the Case

In 1995, a partnership of lawyers from Chicago, Sanchez & Daniels ("SD"), adopted a purported welfare benefit plan

called the Severance Trust Executive Program ("STEP") to provide life insurance, disability and severance benefits to partners and certain employees of the firm. Promoters of STEP represented that STEP was a true welfare benefit plan described in Internal Revenue Code ("Code") §419A(f)(6), 26 USC §419A(f)(6), and not a plan of deferred compensation. (App. M) The promoters promised, *inter alia*, immediate tax deductions.

Several Respondents, known as "Administrative Defendants,"[1] administered STEP, created marketing materials and solicited insurance companies and salesmen. Another group of Respondents, referred to as the "Insurance Companies,"[2] promoted STEP, adapted or approved the STEP marketing materials, and permitted their agents to sell life insurance policies on the lives of STEP participants.

In addition to SD, 255 employers adopted STEP for the benefit of 857 participants. (App. L&M) SD as well as all employers and participants were damaged as the Plan assets were mismanaged while large commissions were paid to

---

[1] The "Administrative defendants" are Wayne Bursey, Daniel Carpenter, STEP Plan Services, Inc., Benistar Insurance Group, Inc., Mellon Trust of New York, Teplitzky & Company, Benistar 419 Plan Services, Benistar Admin. Services, Inc., Benistar 419 Plan, Benistar Employer Trust Services Corp., and Benistar, Ltd.

[2] The "Insurance Company" defendants are National Life Insurance Co., Allmerica Financial Benefit Insurance Co., New York Life Insurance Co., Metropolitan Life Insurance Co., Hartford Insurance Co., and Prudential Insurance Co.

the salesman. Further, excessive fees were paid to the Administrative Defendants.

In 1995 the Internal Revenue Service ("IRS") gave notice of its intent to litigate the deductions claimed by plans like STEP. Notice 95-35, 1995-23 IRB 10. IRS audited several employers who contributed to STEP including Coastal Neurological Surgery Medical Group ("Coastal"). Coastal petitioned the United States Tax Court to contest disallowance of its STEP contributions. It is believed that STEP improperly used Plan assets to fund the Coastal challenge to the IRS. It was not a successful effort as Coastal stipulated that its contributions were to a plan of deferred compensation not a welfare plan.[3] This highly important information was never disclosed to SD or other contributing employers. (App. L&M)

When SD adopted the STEP Plan in 1995, U.S. Trust, a nationally known financial institution, was the trustee. In late 1996, U.S. Trust resigned as trustee. (App. M) This event under the Plan documents was to set in motion procedures for appointment of a new trustee or Plan termination. No one notified Plan Participants that a termination event occurred.

After the resignation of U.S. Trust, a series of events transpired that were orchestrated by Teplitsky. The objective was to prevent appropriate Plan termination and distribution of assets. Moreover, the Defendants below sought to use the

---

[3] United States Tax Court Docket No. 6153-97.

Plan to generate fees and commissions for their own benefit and to the detriment of Plan Participants.

SD through Mr. Koresko made demand of STEP to transfer its plan assets without reduction to a non-STEP welfare plan. In response to a demand letter, STEP immediately sued SD and their counsel for commercial defamation[4]. That suit was dismissed, and SD commenced the class action.[5]

In 2002, John Daniels of SD filed this case on behalf of himself, SD and others similarly situated as a class action. Plaintiffs alleged that the Defendants, either directly or in concert with each other, violated fiduciary duties under ERISA and engaged in RICO violations.

In February 2004, SD hired attorney Clinton Krislov to assist Koresko with the class action. Krislov and Koresko prepared and filed Plaintiffs' motion for class certification in May 2004. (App. I) After the defendants rejected class-wide

---

[4] It is apparently STEP's tactic to sue anyone who challenges the manner in which the STEP Plan was administered. Throughout this case SD and their lawyers have been subjected to multiple strike suits for commercial defamation. These suits were filed despite STEP's payment of a substantial settlement and documented IRS litigation as to the disallowance of 419A(f)(6) deductions.

[5] The action was originally filed in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 02-8213. With the consent of the parties and approval of the Court, the case was voluntarily dismissed. It was then filed in the Circuit Court of Cook County, Ill., and removed to the United States District Court for the Northern District of Illinois.

settlement demands proffered by Koresko in June 2004, Krislov and the parties pursued settlement without Koresko. Krislov then filed several requests to delay disposition of the class certification motion, while he engaged in negotiations for the benefit of SD. (App. C&D)

On June 14, 2004, the District Court denied the first Motion for Injunctive Relief filed by Koresko for Plaintiffs. That motion sought appointment of a receiver over STEP trust assets and records. The Court denied the Motion, as there was not sufficient evidence to link STEP to its former and now criminally indicted chairman, Daniel Carpenter. (App. N) Upon the discovery of additional evidence, a Second Motion for Injunction and Appointment of a Receiver was filed in August 2004. (App. F). This Motion was never reached given the now challenged settlement.

At the same time the Second Motion for Injunction and Appointment of a Receiver was pending, Koresko filed a Motion to Withdraw as Counsel for SD. (App. H). Because Defendant SSI filed suit against Koresko and the Plaintiffs in the Eastern District of Pennsylvania, Koresko believed that a conflict of interest had developed. Koresko's representation of the putative class was not in question.

Krislov and SD negotiated a settlement for themselves. In exchange for payment of a substantial sum to SD, the Defendants agreed to dismiss SD from the Philadelphia strike suit previously noted [while leaving Koresko as a Defendant there]. SD agreed to *withdraw* [not dismiss] *the class allegations* by amendment of the Complaint. (App. E) Petitioner Koresko entered his appearance on behalf of the putative

class members Robert Schmier and Schmier & Fuerring Properties, Inc. as Objectors, and filed extensive objections to the proposed settlement and amendment of the Complaint. Most importantly, Koresko sought stay of the dismissal in order to substitute Schmier or any appropriate party as the class representative. (App. C&D) The District Court deemed the Motions as moot and the Seventh Circuit Court of Appeals opined there was no standing to appeal.

REASONS FOR GRANTING THE WRIT

This case involves four questions of first impression. First, this Court should declare that a cause of action under ERISA for breach of fiduciary duty is property. When a named plaintiff for a putative class of plan participants exercises control over that intangible asset, he should be deemed a fiduciary with respect to the interests of the plan and other participants, consistent with *Varity Corp. v Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). This Court should also declare that ERISA grants former participants standing to appeal, even if the participants do not formally intervene in a putative class action involving rights under Petitioners' ERISA plan. The next issue involves the natural extension of this Court's holding in *Devlin v. Scardelletti,* 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). As the *Devlin* majority noted, "[a]lthough this Court has never addressed the issue, non-named parties in privity with a named party are often allowed by other courts to appeal from the order that affects them." *Devlin,* at 536 U.S. 10, 122 S.Ct. 2010. Petitioners suffered both redressable injury and were in privity with Plaintiffs and Defendants. Standing should have been recognized. Finally, the Court should clarify the scope of

amended Rule 23(e), Fed.Rul.Civ.Pro. In a class action under ERISA, Rule 23(e) should not be literally applied to excuse the district court from reviewing a settlement involving plan fiduciaries. All of these issues have tremendous significance outside the dispute between the parties and resolution of any one of them in favor of Petitioners mandates reversal.

I. THE CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY WAS A PLAN ASSET, AND SD VIOLATED ERISA BY DESTROYING IT FOR THEIR SOLE FINANCIAL ADVANTAGE. PERMITTING ABANDONMENT OF THE CLASS CLAIMS UNDERMINES THE OPERATION OF ERISA §§ 409 AND 502

The courts below overlooked a clearly illegal aspect of the settlement, which triggered Petitioners' opposition. To permit settlement to stand under these circumstances undermines the operation of ERISA §409.

ERISA was enacted in order to protect employee pension and welfare benefit plans. [See H.R. Rep. No. 533, 93d Cong., 2nd Sess. 1, reprinted in 1974 U.S.C.C.A.N. 4639, 4639]. One of the ways ERISA accomplishes this goal is "by setting forth certain general fiduciary duties applicable to the management of [such] plans." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). In relevant part, ERISA provides that "a person is a fiduciary with respect to a plan to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan. 29 U.S.C. § 1002(21).

The term "fiduciary" is liberally construed in keeping with the remedial purpose of ERISA. *American Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 662 (5th Cir. 1988).

The fiduciary duties at issue in this case are the duty of loyalty and the duty to avoid self-dealing. Under ERISA, the duty of loyalty is expressed as follows:

(1)[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries . . . . 29 U.S.C. § 1104(a)(1)(A)(i).

The prohibition against self-dealing provides that "[a] fiduciary with respect to a plan shall not . . . deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1). The "duty of loyalty" requires fiduciaries to act with "complete and undivided loyalty to the beneficiaries of the trust" and with an "eye single to the interests of the participants and beneficiaries." *See, e.g., Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984), *cert. denied sub nom., Engle v. Estate of Johnson*, 479 U.S. 1078 (1989); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2nd Cir.), *cert. denied*, 459 U.S. 1069 (1982). ERISA's "duty of care" requires each fiduciary to act with the "care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters" would employ. 29 U.S.C. § 1104(a)(1)(B). These

duties originate in the common law of trusts, to which Congress specifically looked when legislating ERISA's fiduciary duties. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc.*, 472 U.S. 559, 570 (1985), citing S. Rep. No. 93-127, p. 29 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4639, 4865 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); H.R. Rep., No. 93-533, p. 11 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4649 (identical language).

ERISA provides, in pertinent part, that a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i) and (iii).

Plaintiffs below sued for relief under ERISA §§409 and 502(a), 29 U.S.C. §§ 1109 & 1132(a), to obtain appropriate equitable relief for breach of fiduciary duty. The claims for breach of fiduciary duty under ERISA § 409 were not personal to SD, but rather contemplated plan-wide relief. *See Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). It is hornbook law that a claim or cause of action is property.

When SD took control of plan-wide remedies under ERISA Sec. 409 and 502(a) for such a long period of time in the context of this putative class action, they exercised control over a plan-wide asset. *See Realty Holding Co. v.*

Donaldson, 268 U.S. 398, 401 (1925) (a trust beneficiary's rights are an interest in property, "more than a bare right and much more than a chose in action"). SD therefore became ERISA fiduciaries when they exercised dominion and control over an asset belonging to each plan and participant in the putative class. *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065 (1996). The mere fact that SD did not intend to be a fiduciary is irrelevant, as activities define fiduciary status under ERISA. *Id.* That control of the class claim, and the subsequent harm to its realization by the settlement, is within the scope of ERISA protection. *Varity*, 116 S.Ct. at 1077 (" [ERISA] § 409 reflects special congressional concern about plan asset management"); see also, *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466 (7th Cir. 1997), citing *Chronister Oil Co. v. Unocal*, 34 F.3d 462, 465 (7th Cir. 1994) (recognizing liability for lost opportunity costs). That asset (the claim and the remedy) cannot be utilized and realized for the benefit of the fiduciary alone, especially when other beneficiaries may be unable to assert the claims preserved by SD for itself.

The Department of Labor ("DOL") agrees with Petitioners' argument. In Prohibited Transaction Exemption ("PTE") 2003-39, 68 Fed. Reg. pp 75632-640 (Dec. 31, 2003), DOL issued guidance regarding the settlement of lawsuits arising under ERISA. The DOL views a potential claim or "chose in action" as a type of property and that a plan's release of its claim against such party in interest may constitute a prohibited sale or exchange with the plan, as well as a prohibited transfer or use of plan assets for the benefit of a party in interest. *Id.* *See*, Notice of Proposed Prohibited Transaction

Exemption, 68 Fed. Reg. 6953 (Feb. 11, 2003); DOL Opinion Letter 95-26A (which provides some guidance regarding how this type of prohibited transaction can occur). *See also*, PTE 1999-31.

The instant case is not simply a benefits dispute, the resolution of which lies outside the scope of a prohibited transaction. *Lockheed Corp. v. Spink*, 517 U.S. 882, 892-93 (1996). Plaintiffs sought restitution for Defendants' failure to transfer or distribute plan assets as well as Defendants' unauthorized taking of plan assets. According to DOL, not only is settlement of lawsuits a fiduciary activity, it is a prohibited transaction (self-dealing) under ERISA §406 when plan-wide claims against the settling fiduciaries are involved. Under ERISA § 406(b) [29 U.S.C. § 1106(b)], fiduciaries are prohibited from: (1) dealing with plan assets to benefit themselves; (2) representing parties with interests adverse to the plan or its participants or beneficiaries in transactions concerning the plan; or (3) receiving any form of consideration from any party dealing with the plan in a transaction involving its assets. It is a per se violation of 29 U.S.C. § 1106(b) for a fiduciary to engage in any of these transactions regardless of whether bad faith or the reasonableness of the transaction has been demonstrated. *Leigh v. Engle*, 727 F.2d 113, 123-4 (7th Cir.1984); *see also Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (concluding that § 1106(b) creates a per se ERISA violation and that the exemptions contained in 29 U.S.C. § 1108(b) do not apply to § 1106(b)).

At a minimum, DOL requires involvement of a third party to review the settlement terms. PTE 2003-39. However:

"The exemption also provides that the settlement must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. The intent of this condition is not to deny direct benefits to other parties to a transaction but, rather, to exclude transactions that are part of a broader overall agreement, arrangement or understanding designed to benefit parties in interest."

Id. at 75638. In addition:

"The fiduciary that authorizes the settlement must have no relationship to, or interest in, any of the other parties involved in the litigation, other than the plan, that might affect its best judgment as a fiduciary."

Id. at 75638. These conditions cannot apply here. The entire purpose of the settlement agreement below was to benefit STEP Services, Inc., the Benistar entities, Carpenter, and other parties in interest who faced RICO and other liability for abstraction of plan assets. Third party review did not occur here, for even the District Court disclaimed any obligation of review. Furthermore, there was no acknowledgement that the settlement agreement was executed by a fiduciary acting on behalf of the plan. *Id.*, at 75633. Since the litigation had not been certified as a class action by a court, "an attorney or attorneys retained to advise the plan on the claim, and having no relationship to any of the parties, other than the plan," must determine "that there is a genuine controversy involving the plan." Thus, in the future, not only must there be a genuine controversy, but the plan must engage an attorney to determine that there is a genuine controversy, and that attorney must be unrelated to any of the non-plan parties

to the dispute. That did not occur here, and there was no payment to the plan. *Id.* at 75639.[6]

---

[6] Some additional comments about the exemption:

(1) The DOL has eliminated the requirement that the independent fiduciary "negotiate" the settlement because it realizes that in class action settlements, the "plan fiduciary's role in negotiating the terms of the settlement may be limited." However, the DOL warns that "even where negotiation does not take place between the plan and the defendant, a fiduciary will be compelled, consistent with ERISA's fiduciary responsibility provisions, to make a decision regarding the settlement on behalf of the plan, even if that decision is merely to accept or reject a proposed settlement negotiated by other class members."

(2) Regarding class action lawsuits, the DOL had much to say in the exemption. A Plan fiduciary, faced with a non-opt out class action settlement, "must take such actions as are appropriate under the particular circumstances" and "object to its terms" where necessary on behalf of plan participants. "If the fiduciary takes no action, and the case is settled for far less than the full value of the plan's losses, the burden will be on the fiduciary to justify its inaction."

(3) The original proposed exemption only allowed the receipt of cash in exchange for a release. The final exemption permits "assets other than cash" where necessary to rescind a transaction that is the subject of the litigation, or where such assets are qualifying employer securities for which there is a generally recognized market and value.

The interpretation advanced by Petitioners is a natural and necessary outgrowth of the intersection of ERISA with Rule 23. Parties will be less likely to induce or cooperate with inappropriate actions, like those committed below, because schemes by non-fiduciaries to persuade named plaintiffs to violate fiduciary duty will have their own serious consequences. *See Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (non-fiduciaries liable).

Congress intended that ERISA to protect all plan assets and participants subject to its remedial scheme. An enhanced duty of loyalty under ERISA should attach to class representatives and others who use the class action device exclusive of any jurisprudence under Rule 23,

---

(4) The final exemption provides that the settlement must be reasonable in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.

(5) Finally, the DOL addresses the fact that it is not uncommon for the same transactions to give rise to both ERISA and securities fraud claims and that participants and/or fiduciaries have been able to modify the terms of a release to permit the plan to receive a share of the securities fraud settlement without releasing its ERISA claims against the parties in interest. The DOL notes "that plan fiduciaries should consider whether additional relief may be available for the ERISA claims before agreeing to a broad release."

Fed.Rul.Civ.Pro. It is indeed a cruel paradox, seemingly embraced by the courts below, that parties in charge of an ERISA case could be deemed fiduciaries for purposes of Rule 23, so as to minimize chicanery and sell-out in the class action process, but not fiduciaries for purposes of ERISA §§ 409 and 502.

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*,75 F.3d 1191, 1197 (7th Cir. 1996). However, "public interests may potentially conflict with the desire of the parties to settle their dispute." *Id.*, at 1197 (citations omitted). **In addition, the Court "cannot approve a class action settlement 'which either initiates or authorizes the continuation of clearly illegal conduct.'"** *Id.* (citations omitted) (emphasis added). *See also Kelly v. Kosuga*, 358 U.S. 516, 520, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261-67, 29 S.Ct. 280, 53 L.Ed. 486 (1909)(a court cannot lend its approval to any contract or agreement that violates the law).

The amendment to the complaint and associated settlement violated ERISA. Review by this Court is required to ensure the integrity of ERISA and reverse an error of law.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT OBJECTORS JOHN KORESKO, ROBERT SCHMIER AND SCHMIER FEURRING PROPERTIES, INC. DID NOT HAVE STANDING

A. Petitioners Had Standing Under ERISA.

The Circuit Court appeared to ignore its own precedent that an ERISA plan beneficiary or participant has standing to sue under ERISA, 29 U.S.C. §1102. *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786 (7th Cir. 1996). In *Panaras,* the court held that standing extended to former participants and employees if they had a colorable claim to a payment from a severance plan. *Id.*, at 791, citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18 (1989). Just as SD and Schmier alleged in the present case, *Panaras* argued that he [was] entitled to relief, "because the severance plan was modified without properly notifying him of the change...." *Id.* It follows logically that if former participants or beneficiaries have standing sue under ERISA, they should also have standing to appeal.

B. The Court of Appeals Incorrectly Assumed That Putative Class Members Who Complain About A "Sell-Out" or "Pick-off" Cannot Appeal Unless The District Court Grants Their Motion to Intervene.

Devlin v. Scardelletti, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), holds that *non-intervening* objectors may appeal from settlement decisions involving a certified class.

Relying on *Devlin*, the Court of Appeals held that Petitioners were not among persons with capacity to appeal, since there was no certified class and "they were not bound" by the contested settlement. Even though the Court of Appeals chose to phrase the relevant issue in this case as "capacity to appeal," the issue of standing is the threshold question in every federal case. *Warth v. Seldin,* 422 U.S. 490, 498(1975).

Devlin was never intended by the Supreme Court to imprison "non-party standing" within the realm of only the certified class. This Court's holding in *United States Parole Commission v. Geraghty,* 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) lays bare the error of the strict reading of *Devlin* given by the Court of Appeals:

> "Although one might argue that . . . the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation, e. *g., Gerstein v. Pugh,* 420 U.S. 103, 110, n. 11, 95 S.Ct. 854, 861, n.11, 43 L.Ed.2d 54 (1975). The "capable of repetition, yet evading review" doctrine to be sure, was developed outside the class-action context. See *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 514-515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where

> the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake."

Id., at 100 S.Ct. 1209-10. The Court of Appeals failed to consider whether the wrongs alleged by Petitioners fell within the category of "capable of repetition, yet evading review."

The Court of Appeals relied on the interpretation of *Devlin* set forth in *Korsczak v Sedeman*, 427 F.3d 419 (7th Cir. 2005) for its holding that the failure to intervene deprived Petitioners of standing. Petitioners respectfully submit that either the interpretation or the holding of *Korsczak* must be inaccurate. The *Korsczak* court observed that *to intervene* in a suit is to become a party to it, and a party has a right to appeal from a judgment that inflicts a sufficiently tangible injury on him. *Id.* at 419. *Devlin* holds, however, that the term "party" is irrelevant to analyzing standing. *Korszak* at 422. Even if an intervenor is called a "party," he cannot force litigation to judgment or take an appeal unless he has the kind of interest that confers standing. *Id.* at 420. A "nonparty," [i.e., one who is not an original litigant, not joined, or not permitted intervention] has the ability to litigate and appeal if he has a "tangible interest." *Korsczak* at 420. Accordingly, if the Court of Appeals were true to *Devlin* and *Korsczak,* it should have eschewed the concept of intervention as the *sine qua non* of standing.

The court below should have instead looked for the "tangible interest" for standing in terms of "the irreducible con

stitutional minimum." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State,* 454 U.S. 464, 472 (1982) (citations omitted) The interest can be established if the person seeking to invoke a court's authority can "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Id.* In other words, the Court of Appeals should have simply looked for three elements: (1) injury, (2) causation, and (3) redressibility. *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even the mere likelihood of an indirect injury suffices to confer standing upon a plaintiff. *Clinton v. City of New York*, 524 U.S. 417 (1998). One cannot evaluate "capacity to appeal" without reference to the *Lujan* factors. The Circuit Court did not apply *Lujan* at all and ignored the satisfaction by Petitioners of each *Lujan* element.

The injuries below shone so bright as to have been apparently blinding. First, substantial evidence showed that STEP should have terminated long ago; and thus the actions of the Defendants, vis-à-vis Schmier, SD and the other members of the putative class, were not legal from 1996 to 2002. Hornbook trust law states that since SD produced evidence in its First Motion for Preliminary Injunction that the Defendants were not legitimately in control of STEP or plan assets, the burden of proof shifted to the Defendants to prove the rightfulness of their status and legality of their dealings with Plan assets. *See Chao v. Graf*, 2002 WL 1611122 (D.Nev. 2002)(receiver granted in case of fraudulent multiple em-

ployer trust). In other words, the District Judge incorrectly disposed of the request for injunctive relief because neither SD nor Schmier had *any* burden of proof regarding irreparable harm. (App. F & L). Because the Defendants never satisfied their burden of proof, injury to trust beneficiaries and participants had to be presumed by law. If the District Court had not erred in allocating the burden of why assets and authority should be removed from illegitimate fiduciaries, Defendants would never have been in the position to settle anything. SD never withdrew or disclaimed the Motion, which brought these matters to light. The two courts below erred in the application of hornbook trust law. This error negatively impacted Schmier and others, and it was redressable by the Court of Appeals.

C. Petitioners Had Standing Because Of Participation In The Case Constituting Constructive Intervention, Or Because A Motion To Substitute A Class Representative Is Equivalent To A Formal Motion To Intervene.

Schmier and other putative class members suffered damages apparently incapable of review, because the Seventh Circuit ruled that no one has standing to question breach of fiduciary duty in a pre-certification setting unless they formally intervene. The court completely ignored the doctrine of *constructive intervention*.[7] In the present case, Petitioners

---

[7] See: 28 USCA sec. 1367; *United Mine Workers v Gibb*, 383 US 715, 86 S.Ct. 1130 (1966)—The Federal Rules are to be given the broadest scope and joinder of parties, claims and remedies is

participated in this case as objectors. They filed motions and briefs. The District Court recognized that there was a colorable argument for their participation. In fact, the record reflects that Petitioners actually had to move to compel discovery of the contested settlement agreement, even though Petitioner Koresko had not been permitted to withdraw as counsel for plaintiffs! The Defendants and Plaintiffs both treated Petitioners as adverse parties.

Most notably, Petitioners filed a motion for stay so that a successor class representative could be substituted for Daniels and SD. (App. C). In other words, Petitioners asked that the case not be dismissed immediately so that a new plaintiff could come into the case. There is no substantive difference between that motion and a motion to intervene. Both seek the same result – a new party. If the motion for stay to enable substitution of plaintiff was in substance a motion to intervene, Petitioners had a right to appeal. *Devlin, supra*; see also *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)(would be class representative had standing to appeal).

---

strongly encouraged. Inclusion of all state and/or federal claims by the exercise of the Court's jurisdiction is the general rule rather than the exception. *Colorado River Conservation District v United States*, 424 U.S. 800, 817 (1976); Where there is an interest relating to the subject matter of the action, impairment of a party to protect the interest; inadequate representation by parties to the suit and a timely request, intervention is proper. *United States v Oregon*, 913 F2d 576 (9th Cir. 1990)

D. Petitioners Were In Privity With Defendants and Plaintiffs, Triggering Petitioners' Standing To Appeal

The *Devlin* majority recognized that certain "nonparties" would have standing to appeal:

> ...in particular, those in privity with the named party...True enough. It is not at all clear, however, that such parties may not themselves appeal. Although this Court has never addressed the issue, nonnamed parties in privity with a named party are often allowed by other courts to appeal from the order that affects them. 5 Am.Jur.2d, Appellate Review § 265 (1995).

Devlin, at 536 U.S. 10, 122 S.Ct. 2010. That issue is now ripe for review because the Circuit Court never considered whether Petitioners had privity with the Plaintiffs or Defendants.

There were at least three elements of privity involved in this case. First, SD had been attorneys in the case representing all plaintiffs. (App. C & D). Second, Schmier was a beneficiary of the STEP plan. He was in legal privity with the various defendants who were fiduciaries, controlled his plan assets or benefits, and provided the life insurance contracts he signed under the plan. (App. C) Schmier was also in privity with SD and other defendants by virtue of the structure of STEP. Designed as a multiple-employer plan,

STEP purported to hold all assets in an "unweighted and undivided common fund." (App. C & M) This meant that Schmier had an undivided interest in all funds payable from STEP to SD, or any settlement funds paid by other Defendants which could have been illegally taken from the trust, as alleged in the complaint.

E. For Purposes of Standing, *Devlin* Contemplates That a Person Injured By A Court's Action Is "Bound" by a Judgment.

Neither the Seventh Circuit below nor the *Devlin* court explained specifically what it means to be "bound." Without sufficient analysis, the Seventh Circuit said that Petitioners in the present case are not bound, so they have no injury of which to complain. This disposition of the problem ignores both *Lujan and Devlin*. Regardless of whether a litigant is "bound" in the sense of *res judicata* or collateral estoppel, he can still be injured. *Lujan* inquires whether a litigant has suffered an economic or noneconomic injury as a result of the district court's ruling that can be ameliorated by the appellate court. *Lujan* does not rest on whether anyone is "bound" in a procedural sense. The *Lujan* factors are fact specific, regardless of the procedural posture of a case, with consideration of the practical effects of a court's action upon litigants.

It is not enough for the Court of Appeals to say that Schmier could have filed its own lawsuit once SD agreed to dismiss the instant case. *Lujan* also speaks of noneconomic injury. The Courts below did not consider the expense of repeating litigation that had already consumed two years of the Court's resources, the impact of Defendants' strike suit

strategy on the ability of Schmier to find counsel willing to again incur this abusive litigation, the repugnance of the law to fiduciaries serving under false pretenses (regardless of whether any economic injury occurred), and the general opportunity costs to STEP participants and beneficiaries of justice delayed.

F. Because of the potential for unreviewable fiduciary misconduct, a district court should review settlement of claims in an uncertified class action brought under ERISA, despite the amendments to FRCP 23(e) that indicate a district court's review is discretionary.

Seventh Circuit case law states repeatedly that a district judge and counsel for the putative class (like Krislov in this case) owe fiduciary duties to unrepresented persons. *See Reynolds v. Beneficial Nat. Bank,* 288 F.3d 277, 279-80 (7th Cir. 2002) ("The district judge in the settlement phase of a class action suit is a fiduciary of the class, subject therefore to the high duty of care that the law requires of fiduciaries"); *Culver v. City of Milwaukee,* 277 F.3d 908, 913-15 (7th Cir. 2002) (class representative, lawyer for putative class, and district judge are all fiduciaries). A fiduciary relation assumes that there is a duty of loyalty to someone else – in this case, members of the putative class who otherwise have no voice. Yet, when the District Judge, Defendants, Plaintiffs and Krislov hid behind their interpretation of amended Rule 23(e), they seemingly forgot how fiduciaries are supposed to act.

Thus, a paradox accompanies amended Rule 23(e). Prior to the amendment, the law was clear. Even if the parties did not seek it, the district court had a duty to review under Rule 23(e) anytime a class action allegation was made. *Reynolds, supra; Culver, supra; Bieneman v. City of Chicago,* 838 F.2d 962, 963-964 (7th Cir.1988). Otherwise, the plaintiff could withdraw as representative unilaterally, *Bieneman, supra.*, just as SD did. Although a district court is no longer *required* to evaluate the fairness of a settlement of an uncertified, putative class action under Rule 23(e), the courts below imply that substantive jurisprudence regarding fiduciary duties in class action cases has been modified – lessening duties of the district judge and counsel. Nothing in the reports accompanying adoption of the Rule indicates any intention by this Court to supplant substantive precedent.

If Rule 23(e) is a substantive change to the law, it should not have been applied in this case at all. The version of a federal procedural rule in effect at the beginning of a lawsuit continues to be the law of the case. *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund,* 25 F.3d 509 (7th Cir. 1994)(court applied version of Rule 11 existing at beginning of litigation). No doubt, the changed Rule had a profound substantive impact on the case. It cannot, therefore, be applied retroactively unless the legislature made clear its intention that it shall apply. *Landgraf v. USI Film Products,* 511 U.S. 244, 270, 114 S.Ct. 1483, 1499, 128 L. Ed. 2d 229, 255 (1994). Neither Congress nor the Supreme Court expressed any intent to apply Rule 23(e) retroactively.

In the present case, there is injury, causation and redressability, which the Court of Appeals simply overlooked. This case should be reviewed by the Supreme Court because of misinterpretations of *Lujan* and *Devlin* apparently occurring in the Circuit Courts of Appeal. Before the Plaintiffs' class action bar spins Rule 23(e) out of control to the detriment of countless invisible faces, this Court should make clear that fiduciary duties which existed in prior law were not impacted by the amendment to Rule 23(e) and that somebody has standing to question compliance with those duties. Perhaps the simplest way to resolve the paradoxical impact of Rule 23(e) on fiduciary duties is to clarify that this Rule cannot be literally applied in a class action involving ERISA.

CONCLUSION

For all of the foregoing reasons, Petitioners John J. Koresko, Robert Schmier and Schmier and Feurring Properties respectfully request that this Honorable Court grant certiorari and all appropriate relief consistent with the issuance of the Writ.

Respectfully submitted,

John J. Koresko, V
Attorney For Petitioners

Supreme Court, U.S.
FILED

05 1329 APR 14 2006

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN DANIELS, et al.

v.

WAYNE BURSEY, et al.

IN RE: APPEAL OF JOHN KORESKO AND ROBERT SCHMIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

JOHN J. KORESKO, V, ESQUIRE
200 West Fourth Street
Bridgeport, PA 19405
(610) 992-2200
Counsel for the Petitioners

APPENDIX

Appendix A- Petition for Rehearing En Banc, dated January 17, 2006 ..... 1a

Appendix B – Memorandum Opinion, filed November 29, 2005 ..... 2a

Appendix C – Objection to Motion to Amend and Motion for Stay to Permit Substitution of a Class Representative, dated October 21, 2004 ..... 16a

Appendix D – Motion to Reject Settlement, dated October 11, 2004 ..... 25a

Appendix E – Motion for Leave to Amend Second Amended Complaint to Withdraw their Class Allegations, dated October 1, 2004 ..... 27a

Appendix F – Second Motion for Injunction and Appointment of a Receiver, dated August 24, 2004 ..... 35a

Appendix G – Objection to Motion to Withdraw, dated July 22, 2004 ..... 195a

Appendix H – Motion for Leave to Withdraw as Counsel, dated July 5, 2005 ..... 199a

Appendix I – Motion for Class Certification, dated April 22, 2004 ..... 254a

Appendix J – Amended Memorandum and Order Re: Motions to Dismiss 265a

Appendix K – Motion for Preliminary Injunction, dated March 29, 2004 ..... 313a

Appendix L – Summary of Facts in Support of Motion, dated March 24, 2004..... 319a

Appendix M – Second Amended Complaint, dated November 7, 2003..... 337a

Appendix N –Memorandum and Order Re: Preliminary Injunction, dated June 14, 2004 ..... 455a

Appendix O – Memorandum and Order Re: Withdrawal of Class Allegations, dated October 19, 2004..... 461a

Appendix P – Order of Judgment, dated October 29, 2004 ..... 466a

APPENDIX A – PETITION FOR REHEARING EN BANC, DATED JANUARY 17, 2006

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 17, 2006

Before
Hon. Joel M. Flaum, *Chief Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 04-4316

John Daniels, Manuel Sanchez, Timothy Hoffman, et al.,
Plaintiff-Appellees,

v.

Wayne Bursey, Mellon Trust of New York, Prudential Insurance Company of America, et al.
Defendants-Appellees.

Appeal of:
John J. Koresko, V.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 03 C 1550

Matthew F. Kennelly, *Judge.*

ORDER

On consideration of the petition for rehearing en banc filed by appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX B – MEMORANDUM OPINION, FILED NOVEMBER 29, 2005

In
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 04-4316

JOHN DANIELS, MANUEL SANCHEZ,
TIMOTHY HOFFMAN, ET AL
Plaintiffs-Appellees,

v.

WAYNE BURSEY, MELLON TRUST OF
NEW YORK, PRUDENTIAL INSURANCE COMPANY
OF AMERICA, ET AL.
Defendants-Appellees.

APPEAL OF:
John J. Koresko, V.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 C 1550 – Matthew F. Kennelly, *Judge*.

Argued September 28, 2005 – Decided November 29, 2005

Before FLAUM, *Chief Judge*, and MANION and EVANS, *Circuit Judges*.

MANION, *Circuit Judge:* Sanchez & Daniels, a Chicago law firm, along with several of its partners and employees filed a putative class action suit against administrators and insurers of a benefit fund, alleging that defendants fraudulently marketed and administered the fund. Before a class was certified, the parties agreed to a settlement. John J. Koresko, an attorney for Plaintiffs, filed an appeal on his own behalf and on behalf of putative class members, objecting to the settlement and challenging certain rulings by the district court. Because we concluded that Koresko and the putative class members are not parties to this litigation, thus lacking the capacity to appeal, we dismiss the appeal.

I.

Sanchez & Daniels enrolled in a "severance trust executive program" ("STEP") in 1995 to provide benefits for its employees. In the complaint, Sanchez & Daniels named more than twenty defendants that were involved in marketing, administering, or insuring the STEP plan. Various defendants allegedly promoted the STEP plan as a tax deductible program, which would provide participants with death, disability, and severance benefits, while keeping the funds safe from creditors. These attributes were designed to attract and benefit high income owner-employees.

In 1997, the Internal Revenue Service audited another STEP plan participant, Costal Neurological Surgery Medical Group, that had taken deductions for its contributions to the plan. The audit resulted in proceedings before the United States Tax Court. On February 6, 2001, contrary to the marketing plan, the Tax Court accepted a stipulation by Costal

admitting that the plan was not tax deductible and disallowing approximately 75 percent of the deductions.

After the Tax Court's ruling, on March 28, 2001, Sanchez & Daniels attempted to withdraw from the plan. Responding to concerns from a number of plan participants, including Sanchez & Daniels, the STEP plan administrator wrote to all the employers who were participating in 2002. The letter described the only two options for withdrawal from the plan: participants could terminate affiliation with the plan by forfeiting twenty percent of the plan assets, or participants could forfeit ten percent of the plan assets if they transferred the assets into a particular new plan that provided only death benefits. Sanchez & Daniels rejected both options. Instead, the firm's plan assets be transferred to a new, independent plan.

Litigation soon commenced, culminating in proceedings in the Northern District of Illinois.[1] In this case, Sanchez & Daniels alleged that defendants, through the financial struc-

---

[1] Before this case was filed, the plan administrators sued Sanchez & Daniels and Koresko, as an individual, in the District of Connecticut, claiming that the firm had forfeited its plan assets and that Koresko had defamed the plan. Sanchez & Daniels, individually and on behalf of similarly situated participants, filed complaints against plan administrators and plan insurers in Pennsylvania state court, which was removed to the Eastern District of Pennsylvania before being voluntarily dismissed so the parties could proceed in Chicago. This case was then filed in Circuit Court of Cook County, and then removed to the Northern District of Illinois.

turing, marketing, and administration of the STEP plan, violated the Employee Retirement Income Security Act, the Racketeer Influenced and Corrupt Organizations Act, as well as various state statutes and common law.

Koresko filed a motion for leave to appear *pro hac vice* in the Northern District of Illinois on behalf of plaintiffs, which the plan administrative defendants opposed. Defendants claimed that because Koresko served as the Chief Executive Officer of Penn-Mont Benefit Services, Incorporated, he was a competitor of the plans. As a competitor, defendants argued, Koresko should not be given access to record through the litigation that Koresko could use to his advantage in the marketplace. The district court permitted Koresko's appearance, although the court noted that Koresko's "status as a competitor" may warrant limiting his access to discovery materials. Along with Koresko, plaintiffs were also represented by other counsel.

As the case developed, plaintiffs and defendants began to discuss settlement with the assistance of a magistrate judge. While settlement negotiations were proceeding, Koresko filed a motion to withdraw, claiming a conflict of interest with plaintiffs. Plaintiffs opposed his withdrawal. Because of his pending motion to withdraw, Koresko chose not to participate in the settlement discussions and endeavored unsuccessfully to delay the negotiations until after the resolution of his motion.

On September 8, 2004, the named plaintiffs and defendants reached a settlement. As part of the settlement, plain-

tiffs moved to amend their complaint to eliminate all class claims. Koresko, apparently representing the uncertified class members and his own interests, objected to the withdrawal of the class claims and to the settlement. He also moved for a preliminary injunction, appointment of a receiver, and expedited discovery, and filed an appearance on behalf of putative class members, Robert Schmier and Schmier and Feurring Properties, Incorporated (collectively "Schmier"). Plaintiffs disavowed Koresko's motions. After a hearing, the district court permitted the amendment to eliminate the class claims and denied as moot the motion for class certification. Since the settlement did not encompass any class claim, the district court determined that court approval of the settlement was not necessary. The district court therefore granted the motions by both parties to voluntarily dismiss their claims and entered judgment on October 26, 2004. Koresko filed this appeal on his own behalf and on behalf of the putative class, including Schmier.

II.

As a threshold issue, we must determine whether Koresko and the putative class have the capacity to bring this appeal. Although the parties have framed this issue as one of standing, the preliminary question is whether appellants Koresko and Schmier are parties to the litigation. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) ("What is at issue, instead [of standing], is whether petitioner should be considered of 'party' for the purposes of appealing the approval of the settlement."); *see also Korczak v. Sedeman*, 427 F.3d 419, 422

(7th Cir. 2005); *Churchill Vill. v. Gen. Elec.*, 361 F.3d 566, 572 (9th Cir. 2004) ("the issue is not precisely one of stan ing. . .Instead, the inquiry is best characterized as concerning the definition of a 'party' for purposes of appeal." (citing *Devlin*, 536 U.S. at 7)). A party has the capacity to bring an appeal, but a nonparty does not. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) ("[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.") (citation omitted); Fed.R.App.P.3(c) ("The notice of appeal must [ ] specify the party or parties taking the appeal . . ."). Neither Koresko nor Schmier was named as a party in the litigation, nor did either move to intervene before the district court. Furthermore, the district court never certified a class, so they are not members of a certified class. Thus, at least in the traditional sense, appellants are not parties.

Nonetheless, in limited circumstance Koresko and Schmier may be treated as "parties," and therefore have the capacity to appeal, even if they are not formally recognized as such. *Devlin*, 536 U.S. at 7 (noting that the Supreme Court has "never . . . restricted the right to appeal to *named* parties to the litigation" (emphasis added)). The Supreme Court instructed that "[w]hat is most important" to determining whether individuals are "parties" to an action is "the sense of being bound by the settlement." *Id.* at 10.

Because the class was not certified, Koresko and Schmier have not capacity to appeal just because they are members of a putative class. They may, however, still have the capacity to appeal if the settlement agreement binds them. To determine that possibility, we consider the settlement agreement.

which has been filed under seal. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak,* 313 F.3d 70, 81-81 (2d Cir.2002) ("To determine who may appeal, courts must ascertain whether putative appellants are 'bound by the order from which they were seeking to appeal.'" (citing *Devlin,* 536 U.S. at 8)). Without disturbing the confidentiality of the settlement, we note the following. The settlement agreement is between only the named plaintiffs and defendants. No class claims are resolved by the settlement. While the language suggests that the parties considered and anticipated actions that Koresko might take, Koresko is not bound by the agreement. Addressing contingencies is distinct from binding a third party. Koresko remains free to file a class action or his own claim. In fact, Koresko is currently litigating a fee dispute in a separate action that is pending before the district court. *See Sanchez & Daniels v. Koresko,* No. 04-5183 (N.D. Ill. Filed Aug. 5, 2004).

Because no settlement agreement binds Koresko or the putative class, Koresko and Schmie[illegible]e not in the same circumstances as the unnamed certified class member who was permitted to appeal in *Devlin.* Since a class was never certified, appellants were not members of a class, and therefore could not be bound. *See AAL High Yield Bond Fund v. Deloitte & Touche, LLP,* 361 F.3d 1305, 1310 (11th Cir. 2004) ("Persons who are not class members are not bound at all.") Even the dissent in *Devlin* noted that, "[n]ot even petitioner, however, is willing to advance the novel and surely erroneous argument that a non-named class member is a party to the class-action litigation *before the class is certi*

fied."Id. at 16 n.1 (Scalia, J. dissenting). Thus, *Devlin* does not extend to the appellants in this case.

Koresko attempts to create a theory under ERISA by inviting this court to determine that any attorney for a putative class has a fiduciary duty that elevates his status to that of a party. Koresko cites to *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002), for the proposition that a class action lawyer is the "real plaintiff in interest." In *Culver*, however, this statement was made in the context of illustrating "the danger that the lawyer will sell out the class in exchange for the defendant's tacit agreement not to challenge the lawyer's fee request." *Culver*, 277 F.3d at 910 (citations omitted). The *Culver*, case does not hold that a class action attorney is a party; rather, *Culver* suggests the precarious nature of such a proposition and notes that "the courts and Congress have balked" at considering a class lawyer as "the true plaintiff." *Id.* at 913. Accordingly, we decline to equate an attorney's role as a fiduciary of a class to that of a party.

III.

Since Koresko and Schmier are not bound by the settlement agreement, they do not qualify as parties to the litigation. Accordingly, appellants lack the capacity to appeal, and we therefore DISMISS the appeal.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit